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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-91

LOUISIANA AFFILIATE OF THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS (NORML), *et al.*,

Petitioners,

v.

HON. WILLIAM J. GUSTE, JR., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
1. This case involves important questions concerning the Right of Privacy which have not been, but should be, decided by this Court	8
2. The Court below erroneously applied *Ferguson v. Skrupa*, 372 U.S. 726, as have other courts	19
CONCLUSION	27
APPENDIX A – Judgment of the Court of Appeals	1a
APPENDIX B – Memorandum of the District Court denying the application for a three-judge court	2a
APPENDIX C – Judgment and minute entry of the District Court dismissing the Complaint	12a

Page

APPENDIX D – Statutory provisions involved . . 14a

TABLE OF CITATIONS

Cases:

Adkins v. Childrens Hospital,
261 U.S. 525 (1923) 23

Allgeyer v. Louisiana,
165 U.S. 578 (1897) 12

Ashley v. City of Macon, Ga.,
377 F. Supp. 540 (D.C. Ga. 1974) 24

Barry v. Dwen,
No. 74-1269, *cert. granted,* 43 U.S.L.W. 3621
(May 27, 1975) 24-25

Bishop v. Colaw,
450 F.2d 1069 (8th Cir. 1971) 24

Block v. Hirsh,
265 U.S. 135 (1921) 21

Boyd v. United States,
116 U.S. 616 (1886) 11

Breen v. Kahl,
419 F.2d 1034 (7th Cir. 1969) 24

Communist Party v. SACB,
367 U.S. 1 (1961) 21

Coppage v. Kansas,
236 U.S. 1 (1915) 23

Page

Crane v. Campbell,
245 U.S. 304 (1917) 17

Eisenstadt v. Baird,
405 U.S. 438 (1972) 12, 13

Ex parte Poresky,
290 U.S. 30 (1933) 6, 16

Farmer v. Catmull,
339 F. Supp. 70 (D.C. Utah 1972) 24

Ferguson v. Skrupa,
372 U.S. 726 (1963) 3, 7, 16, 19, 22-24

Fireman v. Chicago, R.I. & P. R.R. Co.,
393 U.S. 129 (1968) 23

Freeman v. Flake,
448 F.2d 258 (10th Cir. 1971) 23-24

Goosby v. Osser,
409 U.S. 512 (1973) 4, 16

Karr v. Schmidt,
460 F.2d 609 (5th Cir. 1972) 24

Leary v. United States,
395 U.S. 6 (1969) 21

Levy v. Louisiana,
391 U.S. 68 (1968) 25

Lochner v. New York,
198 U.S. 45 (1905) 23

Mapp v. Ohio,
367 U.S. 643 (1961) 11

Page

McKart v. United States,
395 U.S. 185 (1969) 19

McLucas v. DeChamplain,
__U.S.__, 43 U.S.L.W. 4453 (April 15, 1975) 15

Meyer v. Nebraska,
262 U.S. 390 (1923) 12

Mugler v. Kansas,
123 U.S. 623 (1887) 20

NORML v. Wilson,
Civil Action No. 1897-73, U.S. District Court for the
District of Columbia Circuit 18

N.L.R.B. v. Industrial Union of Marine and Shipbuilding Workers,
391 U.S. 418 (1968) 19

Olmstead v. United States,
277 U.S. 438 (1928) 12

Paris Adult Theatre I v. Slaton,
413 U.S. 49 (1973) 10, 17, 18

People v. McCabe,
49 Ill.2d 338, 275 N.E.2d 407 (1971) 17

People v. Sinclair,
387 Mich. 91, 194 N.W.2d 878 (1972) 17

Ravin v. State,
Op. No. 1156, File No. 2135, Sup. Ct. Alaska
(May 27, 1975) 9, 13-15, 22

Richards v. Thurston,
424 F.2d 1281 (1st Cir. 1970) 24

Page

Roe v. Wade,
410 U.S. 113 (1973) 8, 12, 21, 22

Seagram & Sons v. Hostetter,
384 U.S. 129 (1968) 23

Stanley v. Georgia,
394 U.S. 557 (1969) 8, 9, 10, 12, 16, 21

State v. Kantner,
53 Haw. 327, 493 P.2d 306 (1972), *cert. denied,*
409 U.S. 948 (1972) 25-26

Union Pacific Railway Co. v. Botsford,
141 U.S. 250 (1891) 11

United States v. Abilene & So. R.R. Co.,
265 U.S. 274 (1924) 19

United States v. Carolene Products Co.,
304 U.S. 144 (1938) 20

United States v. Kiffer,
477 F.2d 349 (2d Cir. 1973), *cert. denied,*
414 U.S. 813 (1973) 19

United States v. Robinson,
414 U.S. 218 (1973) 10

United States v. 12 200-Ft. Reels of Super 8 MM. Film,
413 U.S. 123 (1973) 10

Weber v. Aetna Cas. & Sur. Co.,
406 U.S. 164 (1972) 13

Weeks v. United States,
232 U.S. 383 (1914) 11

Page

Wolf v. Colorado,
338 U.S. 25 (1949) 11

Statutes:

Controlled Substances Act, 21 U.S.C. Sec. 801, *et seq.* . *passim*

Louisiana Controlled Dangerous Substances Law,
LSA-R.S. 40:961, *et seq.* . . . . . *passim*

21 U.S.C. Sec. 176a 21

28 U.S.C. Sec. 1331 6

28 U.S.C. Secs. 2281-84 4

42 U.S.C. Sec. 1983 6

Other Authorities:

Hamilton, Federalist Paper No. 78, *The Federalist Papers*
(Rossiter Ed. 1961) 26

Mill, *Principles of Political Economics*, Vol. II (1848) . . . 12

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 17, 1975.

OPINIONS BELOW

The *per curiam* judgment of the Court of Appeals is not officially reported, and is reprinted at p. 1 of the Appendix hereto. The opinion of the District Court denying the application for a three-judge court is reported at 380 F. Supp. 404, and is reprinted at pp. 2-12 of the Appendix. The judgment and minute entry of the District Court subsequently dismissing the Complaint is not reported, and is reprinted at pp. 12-14 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 17, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

Petitioners filed a Complaint in U.S. District Court alleging that the Right of Privacy, and other Constitutional guarantees, were violated by statutes which make it a criminal offense for adults to possess and use marijuana in private. The District Court denied petitioners' application for a three-judge court, and subsequently dismissed the Complaint, on the ground that the Constitutional issues raised were "obviously without merit." The Court of Appeals affirmed *per curiam*. The questions presented are:

1. Should a three-judge court be empanelled to hear this case, because the Right of Privacy, and the other Constitutional issues raised in the Complaint, are not obviously without merit or clearly precluded by this Court's previous decisions.

2. What standard should be used in evaluating the Constitutionality of these criminal prohibitions: the "compelling state interest" test, the "rational basis" test, or an "intermediate" test similar to that recently adopted by the Supreme Court of Alaska.

3. Was the lower court correct in concluding that *Ferguson v. Skrupa*, 372 U.S. 726, forecloses any judicial scrutiny of the legislative interests supporting the marijuana prohibition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional provisions involved in this case are the Right of Privacy embodied in the Fourteenth Amendment, the Equal Protection Provisions of the Fifth and Fourteenth Amendments, and the Cruel and Unusual Punishment provision of the Eighth Amendment.

The statutes involved in this case are the Federal Controlled Substances Act, 21 U.S.C. Sec. 801, *et seq.*, and the Louisiana Controlled Dangerous Substances Law, LSA-R.S. 40:961, *et seq.*, the pertinent provisions of which are reprinted at pp. 14-17 of the Appendix hereto.

STATEMENT OF THE CASE

On January 21, 1974, petitioners filed a Complaint in the U.S. District Court for the Eastern District of Louisiana challenging, on Constitutional grounds, the Federal and Louisiana statutes which make it a criminal offense for adults to possess and use marijuana in private. The Complaint sought a declaratory judgment that the Federal Controlled Substances Act, 21 U.S.C. Sec. 801, *et seq.*, and the Louisiana Controlled Dan-

gerous Substances Law, LSA-R.S. 40:961, *et seq.*, were unconstitutional insofar as they make such private possession and use a criminal offense in the State of Louisiana. Injunctive relief was also sought against the enforcement of these statutes.[1]

Petitioners co-filed with their Complaint an application requesting that a three-judge Court be empanelled pursuant to 28 U.S.C. Secs. 2281-84, because the Constitutional issues raised in the Complaint were not "obviously without merit" or "wholly insubstantial." *Goosby v. Osser*, 409 U.S. 512, 518-19 (1973).

The Complaint alleged that imposing criminal sanctions upon the private possession and use of marijuana by adults violated three Constitutional guarantees – the Right of Privacy and liberty embodied in the Fourteenth Amendment, the Equal Protection provisions of the Fifth and Fourteenth Amendments, and the Cruel and Unusual Punishment provision of the Eighth Amendment.

In connection with the Right of Privacy, which was the principal cause of action contained in the Complaint, it was alleged that the marijuana prohibitions invade a number of "fundamental" interests or zones of privacy, including (1) the privacy of the home, in and of itself, and (2) the right

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[1] Plaintiffs below, and Petitioners in this Court, are the Louisiana Affiliate of the National Organization for the Reform of Marijuana Laws (NORML), and a person employing the pseudonym "John Doe." The Complaint contained class action allegations, but this was never reached by the District Court.

Defendants below, and Respondents in this Court, are the Governor and Attorney General of Louisiana (hereinafter "Louisiana Respondents"), the Attorney General of the United States and the Administrator of the Drug Enforcement Administration, U.S. Department of Justice (hereinafter "Federal Respondents").

to be let alone by government to develop one's personality as one sees fit. Since these fundamental interests were involved, the Complaint alleged that the criminal prohibitions were subject to "particularly careful scrutiny" by the Court, they must be "necessary" to the fulfillment of "overriding and compelling governmental interests," and must be "narrowly drawn so as not to invade protected freedoms." In the alternative, it was alleged that even if the case did not involve fundamental interests; it was necessary to scrutinize the statutory prohibitions to determine whether they satisfy the less stringent "rational relationship" test. An intermediate test was also proposed in the Complaint.[2]

The Complaint alleged that the criminal prohibitions against the private possession and use of marijuana were unconstitutional under any of these tests.[3] The Complaint sought a factual inquiry into the state interests supporting these prohibitions, and in support it was alleged that:

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[2] The Complaint alleged:

> The police power of the states and the federal government is inherently limited to the protection of the public welfare. Before the *private* possession and use of marijuana can be criminalized, it must be shown (a) that private use of marijuana adversely affects the public welfare, and (b) that the adverse effect upon the public welfare outweighs the intrusion into *prima facie* private conduct.

[3] Simple possession of marijuana is a misdemeanor under Federal and Louisiana law. The penalty for simple possession, first offense, under Federal law is up to one year's imprisonment and/or a fine of up to $5,000. 21 U.S.C. Sec. 844(a). The penalty under Louisiana law is up to 6 months imprisonment and/or a fine of up to $500. LSA-R.S. 40:966(D). These provisions are set out in Appendix D.

> Each of the successive rationales put forward to justify the marijuana prohibition has been demonstrated to be unsupported and unsupportable by modern scientific evidence. Specifically, marijuana is not a narcotic, and its use does not lead to physical addiction or dependence; marijuana use does not cause crime or aggressive behavior; marijuana does not lead to the use of dangerous or so-called hard drugs such as heroin; marijuana does not cause insanity; and, marijuana does not cause users to "drop out" of society.

The Federal and Louisiana defendants filed motions opposing the application for a three-judge Court, and seeking dismissal of the Complaint.

On May 29, 1974, the District Court handed down its decision denying the application for a three-judge court. See p. 2, *et seq.* of the Appendix hereto. The opinion of the District Court indicates that the application was denied for the single reason that the constitutional issues raised in the Complaint were not substantial. The District Court recognized that "insubstantiality" for the purpose of empanelling a three-judge court meant that the issues must be "obviously without merit" or so clearly foreclosed as to "leave no room for the inference that the question sought to be raised can be the subject of controversy." See p. 4 of the Appendix, quoting from *Ex parte Poresky*, 290 U.S. 30, 32 (1933).[4]

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[4] The District Court specifically found that jurisdiction existed with respect to the Federal Defendants through 28 U.S.C. Sec. 1331, and that jurisdiction existed with respect to the Louisiana defendants through 42 U.S.C. Sec. 1983. See p. 5 of the Appendix. Neither the District Court decision, nor the Court of Appeals *per curiam* affirmance, discusses any other issue.

The District Court's opinion addresses each of the three constitutional issues raised in the Complaint. With respect to the Right of Privacy, the Court held that the private possession and use of marijuana in one's own home "is not and cannot be classified as a fundamental right," and that the "compelling state interest" test was therefore not applicable. See p. 7 of the Appendix. The District Court then stated that even if it were to apply the "compelling state interest" test, there was a compelling interest supporting the marijuana prohibitions, which was protection of the public health and welfare. The Court reasoned that since these prohibitions were based upon the authority to legislate for the public health and welfare, the Court could not "substitute its judgment" for that of the legislatures (App., p. 10):

> Congress and the state legislature have both found it necessary for general health and welfare to regulate the use and possession of dangerous drugs. This Court is in no position to substitute its judgment for that of the legislature.

In support of this conclusion, the Court cited *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

The District Court then addressed the Cruel and Unusual Punishment allegations, and concluded that they are also without merit, stating that "the court finds that the conduct is legitimately proscribed by the legislatures." See p. 10 of the Appendix. Finally, the Court held that the Equal Protection allegations were also without merit, citing *Ferguson* again, and stating that the Court could not question the legislative prohibitions because they were based upon "the authority to legislate for the public health and welfare." See p. 11 of the Appendix. The District Court's opinion concluded (App., p. 11):

> The Plaintiffs' request for the convening of a three-judge court is hereby and the same denied for lack of a substantial federal question since the allegations are plainly without merit.

Subsequently, the District Court granted motions to dismiss the Complaint, adopting as its reasons the opinion it had issued denying the application for a three-judge court. See App., pp. 12-14.

An appeal was taken to the U.S. Court of Appeals for the Fifth Circuit, seeking an order reversing the District Court and directing that a three-judge court be empanelled. On April 17, 1975, the Fifth Circuit handed down a *per curiam* decision affirming the District Court, which stated in full (App., p. 1):

> AFFIRMED, on the basis of the well-reasoned opinion of District Judge Comiskey, 380 F. Supp. 404 (1974).

REASONS FOR GRANTING THE WRIT

1. This case involves important questions concerning the Right of Privacy which have not been, but should be, decided by this Court

In previous cases involving the Right of Privacy, this Court has followed a two-tiered test: If the rights involved were deemed to be "fundamental," the statute infringing those rights had to be shown to be "necessary" to furthering a "compelling state interest"; if the rights were not deemed to be fundamental, any "rational basis" that might be conceived to justify the legislation was held to be sufficient. *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965).

The principal questions concerning the Right of Privacy which are raised in this case are: First, do statutes which make the private possession and use of marijuana by adults a criminal offense infringe upon "fundamental" interests? Second, should this Court consider a new "intermediate" test similar to that formulated by the Supreme Court of Alaska in a recent case involving marijuana and the Right of Privacy provision contained in the Alaska Constitution? *Ravin v. State*, Op. No. 1156, File No. 2135 (May 27, 1975). Third, whatever test should be applied, is it "obviously without merit" that the private possession and use of marijuana by adults could be protected by the Right of Privacy?

(A) Is the privacy of the home, in and of itself, a "fundamental" zone or interest? In *Stanley v. Georgia*, 394 U.S. 557 (1969), this Court held that the possession of obscene materials in a person's home involved fundamental interests. The Court's opinion focused upon two distinct interests – the right to receive information and ideas and the privacy of the home:

> It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society. Moreover, in the context of this case – a prosecution for mere posssession of printed or filmed matter in the privacy of a person's own home – that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy. 394 U.S. at 564.

In cases subsequent to *Stanley* involving transportation, distribution, and "commercial" presentation of obscene materials, this Court has emphasized that *Stanely* did not involve the right to receive information and ideas so much as it did the privacy of the home. See, *e.g., United States v. 12 200-Ft. Reels of Super 8 MM. Film,* 413 U.S. 123, 126 (1973). In *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 66 (1973), Mr. Chief Justice Burger, writing for the Court, indicated that the "privacy right encompasses and protects the personal intimacies of the home," and described *Stanley* as "hardly more than a reaffirmation that 'a man's home is his castle.'"

It would now be appropriate for this Court to rule directly on this important question of whether the privacy of the home or other residence is, in and of itself, a "fundamental" interest in terms of the Right of Privacy.

The privacy of the home, contrary to the District Court below (see App., p. 7), is related to, and emanates from, a number of specific guarantees in the Bill of Rights, including the Third Amendment ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner . . .") and the Fourth Amendment ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . .").

The privacy of the home is also an area about which Americans entertain legitimate expectations of privacy. See, *e.g.,* Mr. Justice Powell's concurring opinion in *United States v. Robinson,* 414 U.S. 218, 236 (1973).

In a number of different contexts, this Court has indicated that the privacy of the home is "fundamental," "basic to a free society" and "implicit in the concept of ordered liberty."

See, *Wolf v. Colorado,* 338 U.S. 25, 27-28 (1949); *Mapp v. Ohio,* 367 U.S. 643, 656 (1961); *Weeks v. United States,* 232 U.S. 383, 390-91 (1914); *Boyd v. United States,* 116 U.S. 616 (1886). In *Boyd,* the Court stated in 1886:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . (116 U.S. at 630).

(B) Is the right to be let alone by government to develop one's personality as one sees fit a "fundamental" interest in terms of the Right of Privacy? This Court has indicated in a number of different contexts that the right to be let alone – the right of personal autonomy – is a fundamental value in this country. In *Union Pacific Railway Co. v. Botsford,* 141 U.S. 250, 251 (1891), the Court stated:

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, "the right to one's person may be said to be a right of complete immunity: to be let alone."

Similarly, in *Meyer v. Nebraska*, 262 U.S. 390, 392 (1923), it was stated:

> [W]e should not overlook the fact that the spirit of America is liberty and toleration – the disposition to allow each person to live his own life in his own way, unhampered by unreasonable and arbitrary restrictions.

See also, *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Stanley v. Georgia*, 392 U.S. 557, 564 (1969), quoting from *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *Roe v. Wade, supra*, 410 U.S. at 154.

John Stuart Mill eloquently stated this principle in *Principles of Political Economics*, Vol. II, pp. 560-61 (1848):

> There is a circle around every individual human being, which no government, be it that of one, of a few, or of the many, ought to be permitted to overstep; there is a part of the life of every person who has come to years of discretion, within which the individuality of that person ought to reign uncontrolled either by any other individual or by the public collectively. That there is, or ought to be, some space in human existence thus entrenched around and sacred from authoritative intrusion, no one who professes the smallest regard to human freedom or dignity will call in question.

This Court should now rule on whether the right of personal autonomy, either standing alone or in conjunction with the privacy of the home, represents fundamental interests in terms of the two-tiered Right of Privacy test.

(C) Petitioners respectfully suggest that this Court consider the adoption of a new "intermediate" test for judging the constitutionality of statutes which are alleged to violate the Right of Privacy, as this Court has done in analyzing Equal Protection claims. See, *e.g., Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

The Supreme Court of Alaska recently formulated a new test by which it judged the constitutionality of the State's marijuana prohibition in terms of the Right of Privacy provision contained in the Alaskan Constitution. *Ravin v. State*, Op. No. 1156, File No. 2135, May 27, 1975. The Court's opinion, recognizing that there was "considerable dissatisfaction" with the two-tiered privacy test, Slip Op. at 5, formulated the following test:

> It is appropriate in this case to resolve Ravin's privacy claims by determining whether there is a proper governmental interest in imposing restrictions on marijuana use and whether the means chosen bear a substantial relationship to the legislative purpose. If governmental restrictions interfere with the right of privacy, we will require that *the relationship between means and ends be not merely reasonable but close and substantial.*
>
> * * *
>
> The privacy of the individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest. *Here, mere scientific doubts will not suffice. The state must demonstrate a need based upon proof that the public health or welfare will in fact suffer*

if the controls are not applied. (Slip Op. at 6-7, 40) (emphasis added).

Employing these principles, the Alaskan Supreme Court unanimously held that the private possession of marijuana for personal use by adults was protected by the Right of Privacy contained in the Alaskan Constitution.[5] The opinion of the Court, issued subsequent to the Fifth Circuit's *per curiam* affirmance below, was written by Chief Justice Rabinowitz. Justices Boocher and Conner filed concurring opinions.

All of the Justices on the Alaskan Supreme Court agreed that possession of marijuana by adults for personal use in the home was constitutionally protected. See Slip Op. at 40-41, 51-52, 53. All of the Justices also agreed that the prohibition against the possession or use of marijuana while operating a motor vehicle was valid and constitutional, stating, in the words of the Court: "The one significant risk in use of marijuana which we do find established to a reasonable degree of certainty is the effect of marijuana intoxication on driving." Slip Op. at 33; see also, Slip Op. at 39-40.

The Court's opinion indicates that it would decide in future cases whether the possession and/or use of marijuana in other contexts outside the home would be constitutionally protected. Slip Op. at 39-40. The concurring opinions

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[5] Art. I, Sec. 22 of the Alaskan Constitution provides: "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section." As the Alaskan Supreme Court noted, however, the mere fact that the Constitution contains an express provision recognizing the right of privacy does not "yield answers" concerning the test to be applied when statutes allegedly infringe on that right, or determine what scope should be accorded the right. Slip Op. at 13.

filed by Justices Boochever and Conner indicated that in their view the Right of Privacy protects some activities outside the home, but they agreed with the Court's opinion that this should be reserved for future cases depending on the specific facts of the case. Slip Op. at 52 and 54.

The Court's opinion also indicates that there is no constitutional protection to buy or sell marijuana, and no protection for possession at home of amounts of marijuana indicative of an intent to sell, rather than for personal use. See Slip Op. at 40-41. The Court also implied that the right to possess in the home might be limited to adults, and might not be extended in future cases to include juveniles, noting that "distinct government interests with reference to children may justify legislation that could not properly be applied to adults." See Slip Op. at 40 and fn. 69.

Petitioners have lodged copies of the *Ravin* Slip Opinion with the Clerk's Office, and would commend it to the attention of the Court. Petitioners believe it would be desirable for this Court to consider adopting a new test for the Federal Right of Privacy, similar to the test adopted by the Supreme Court of Alaska in *Ravin*.

(D) Whatever test or principles should be applied, a three-judge court should be empanelled because the Right of Privacy allegations contained in the Complaint are not "obviously without merit."

There has never been any dispute in this case that the standard for empanelling a three-judge court is whether the Constitutional claims are "obviously without merit," "wholly insubstantial," or so clearly foreclosed as to "leave no room for the inference that the question sought to be raised can be the subject of controversy." See, *e.g.*, *McLucas v. De Champlain*, __U.S.__, 43 U.S.L.W. 4453, 4456 (April 15,

1975); *Goosby v. Osser*, 409 U.S. 512, 518-19 (1973); *Ex parte Poresky*, 290 U.S. 30, 32 (1933).

The District Court below, in holding that the Right of Privacy and the other claims were "obviously without merit," relied primarily on *Ferguson v. Skrupa*, 372 U.S. 726 (1963). Whether this reliance upon *Ferguson* is "well-reasoned" (as the Fifth Circuit believed, App. p. 1) or constitutes an unwarranted and inappropriate expansion of *Ferguson* (as petitioners believe), is discussed in Part II of this petition, below.[6]

The District Court also relied upon a footnote in *Stanley v. Georgia*, *supra*, where the Court, taking care to limit its holding to possession of obscene materials by an individual in his home, indicated that its ruling did not affect the power of the states or federal government to prohibit the possession of "narcotics," firearms, stolen goods, and other articles, noting that no First Amendment interests are ordinarily involved. 394 U.S. at 568 fn. 11. Petitioners would point out that they do not challenge the power of the States or Federal Government to prohibit in the home the possession of truly dangerous substances or items. However, there is another side to this issue which must be faced: what if the substance is not truly dangerous, and its private possession and use does not pose any substantial danger or harm to the public health and welfare? Petitioners must have an opportunity to show that, whatever standard is appropriate, there is no sufficient government interest to justify the criminal sanctions against private possession and use of marijuana. Whether

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[6] Petitioners have focused on the privacy issue herein, but the Complaint also contained allegations involving Cruel and Unusual Punishment and Equal Protection, and the District Court applied *Ferguson* to each of these allegations. See p. 7, *supra*.

this footnote in *Stanley* used the term "narcotic" in its literal sense, *i.e.*, opiates and opiate-derivatives, or in the broader sense of "dangerous" drugs, it does not foreclose the issues raised here.[7] In addition, as pointed out above, this Court has indicated in cases subsequent to *Stanley* that even in the absence of First Amendment interests, the privacy of the home, in and of itself, may be a "fundamental" interest. See, *e.g.*, *Paris Adult Theatre I v. Slaton*, *supra*, 413 U.S. at 66.

Another case which is relevant in this appeal, but was not cited by the District Court, is *Crane v. Campbell*, 245 U.S. 304 (1917), where this Court held that the states could prohibit the private possession of alcoholic beverages without violating the guarantees of the Fourteenth Amendment. *Crane* does not "clearly foreclose" the constitutional issues raised in this case involving marijuana. First, the Court in *Crane* based its decision, in part, upon the "well known noxious qualities and extraordinary evils," attendant to the use of alcoholic beverages. 245 U.S. at 307. As pointed out above, Petitioners are arguing that the private use of marijuana does not have such consequences, and that a three-judge court should be empanelled to hear this issue.

Second, the Court in *Crane* reasoned that the right to possess alcohol would "necessarily imply" the right to procure it, and the Court noted that it had previously rejected

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[7] We do not think that Respondents would claim that marijuana is a "narcotic" drug under any accepted criteria for, or definition of, that term. Two state supreme courts have recently declared unconstitutional state statutes which classified marijuana as a "narcotic" drug and penalized marijuana-related offenses the same as "narcotic"-related offenses. *People v. McCabe*, 49 Ill.2d 338, 275 N.E.2d 407, 413 (1971); *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878, 887 (1972).

Constitutional arguments dealing with the right to procure and transport alcohol. 245 U.S at 308. However, this reasoning was explicitly rejected in *Stanley v. Georgia*, when the Court enunciated a right to private possession of obscene materials, see 394 U.S. at 567-68, and in *Paris Adult Theatre I v. Slaton, supra*, 413 U.S. 49, 66 (1973), where the Court, while not questioning *Stanley*, refused to extend this right to the transportation or procurement of obscene materials.

In connection with whether the issues involved in this case are "insubstantial," petitioners would also bring to the attention of the Court a suit now pending in the U.S. District Court for the District of Columbia Circuit, *The National Organization for the Reform of Marijuana Laws (NORML), et al. v. Wilson, et al.*, Civil Action No. 1897-73. The Complaint in that suit is similar to the Complaint in the instant suit. The District Court Judge who initially received the Complaint denied motions to dismiss based upon a number of grounds, including lack of a substantial federal question, and granted the application for a three-judge court. The three-judge court was empanelled on March 14, 1974. The three-judge court then received motions to dismiss on a number of grounds, including lack of a substantial federal question. The three-judge court denied these motions in an order without opinion dated November 11, 1974, but in that same order the Court stayed the case until the conclusion of an administrative proceeding in the U.S. Department of Justice (Drug Enforcement Administration). Whether or not the doctrine of exhaustion of administrative remedies will still be relevant when this case is remanded for a three-judge court is an issue we believe should be addressed to the three-judge court, if one is to be empanelled, and not to this Court. The District Court below did not mention or discuss the exhaustion doctrine, and this Court has long held that the application of the exhaustion doctrine is within the "sound

discretion" of the trial court. See, *e.g., McKart v. United States*, 395 U.S. 185, 193 (1969); *N.L.R.B., v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418, 426 (1968); *United States v. Abilene & So. R.R. Co.*, 265 U.S. 274, 282 (1924). See also, *United States v. Kiffer*, 477 F.2d 349 (2d Cir. 1973), *cert. denied*, 414 U.S. 831 (1973).

2. The Court Below Erroneously Applied *Ferguson v. Skrupa*, 372 U.S. 726, As Have Other Courts.

The District Court held that even if the private possession and use of marijuana involved "fundamental rights," the Constitutional claims contained in the Complaint were still "obviously without merit." The District Court reasoned that even if it were to apply the compelling state interest test, there was a compelling state interest supporting the marijuana prohibitions, *i.e.*, protection of the public health and welfare. Since these prohibitions were based upon the authority to legislate for the public health and welfare, the Court concluded that it could not "substitute its judgment" for that of the legislatures (App., p. 10):

> Congress and the state legislature have both found it necessary for general health and welfare to regulate the use and possession of dangerous drugs. This Court is in no position to substitute its judgment for that of the legislature.

For this conclusion, which was the heart of the District Court's decision, the Court relied exclusively on *Ferguson v. Skrupa, supra*, 372 U.S. 726 (1963).

The Fifth Circuit found this to be "well reasoned" (App., p. 1), but Petitioners submit that the opposite is true: This

decision elevates the phrase "protection of the public health and welfare" into a magic incantation that merely must be invoked to foreclose absolutely any constitutional challenge. The Court's reasoning, and its use of *Ferguson*, in denying petitioners even a three-judge court eliminates entirely the historic role of the Courts in protecting individual rights and liberties.

This Court has indicated over and over again that the courts have the power, and *the duty*, to inquire into the facts behind a statute. In *Mugler v. Kansas*, 123 U.S. 623, 661 (1887), the Court stated:

> The Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty – indeed, under a solemn duty – to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute proporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by the fundamental law, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution.

See also, *United States v. Carolene Products Co.*, 314 U.S. 144, 153-54 (1938):

> [W]e recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition.

More recently, this Court reversed the Fifth Circuit in a case involving a presumption in the previous federal marijuana law. *Leary v. United States*, 395 U.S. 6 (1969). One of the issues decided in *Leary* was whether the presumption in 21 U.S.C. Sec. 176a, which provided that a possessor of marijuana was deemed to know of its unlawful importation into the United States, denied petitioner Due Process of Law. The Court, in declaring the presumption unconstitutional, stated, 395 U.S. at 38:

> [W]e have not confined ourselves to data available at the time the presumption was enacted in 1956, but have also considered more recent information, in order both to obtain a broader general background and to ascertain whether the intervening years have witnessed significant changes which might bear upon the presumption's validity.

In a footnote, the Court added (*Id.*, fn. 68):

> A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge a court must, of course, be free to re-examine the factual declaration. See *Block v. Hirsh*, 256 U.S. 135, 154-155 (1921); *Communist Party v. SACB*, 367 U.S. 1, 110-114 (1961).

In this Court's previous decisions involving the Right of Privacy, *Griswold v. Connecticut*, *Stanley v. Georgia*, and *Roe. v. Wade*, *supra*, it was argued by the State that the prohibitions involved were supported by considerations of the public health and welfare. In each of these cases the Court

scrutinized the legislative purposes supporting the challenged statutes. Such scrutiny is also appropriate here.[8]

Moreover, the Complaint in this case does not ask the Court to substitute its judgment on the wisdom of the law for that of the legislature, but to fulfill the historic judicial role of defining the constitutional rights of individuals and the limitations on government powers.[9]

Ferguson v. Skrupa involved a state statute which prohibited the practice of debt adjusting except as incident to the practice of law. In reversing the lower court's use of the Due Process Clause to strike down this statute, the Court stated, 372 U.S. at 731:

> We emphastically refuse to go back to the time when courts used the Due Process Clause to strike

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[8] In *Roe v. Wade*, Mr. Chief Justice Burger, concurring, indicated that he was "somewhat troubled that the Court has taken judicial notice of various scientific and medical data in reaching its conclusion." 410 U.S. at 208. In this case, petitioners seek a full factual inquiry before the three-judge court.

[9] In *Ravin*, the Supreme Court of Alaska recognized that the wisdom of legislative enactments was for the legislatures, not the Courts, Slip Op. at 44:

> In opposition, the State argues that under Alaska's Constitutional system of separate but equal branches of government the issue is a "political controversy over the State's fundamental policy toward the drug marijuana." Thus, the "issue should be properly determined by the peoples' elected representatives." We agree that determination of the wisdom of a particular legislative enactment is more properly the subject of investigation and resolution by the legislature rather than the judiciary.

> down State laws regulatory of business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought.

Each of the state laws which were referred to in *Ferguson* as being mistakenly stricken involved the regulation of commercial or economic practices. See, *e.g., Adkins v. Childrens Hospital,* 261 U.S. 525 (1923) (minimum wage for women); *Lochner v. New York,* 198 U.S. 45 (1905) (maximum working hours for bakeries): *Coppage v. Kansas,* 236 U.S. 1 (1915) ("yellow dog" contracts).

This Court has consistently applied *Ferguson* when economic regulations have been challenged as unwise or undesirable under the Due Process Clause. See, *e.g., Seagram & Sons v. Hostetter,* 384 U.S. 35, 47 (1966) (regulation of distillers and wholesalers by state liquor control board); *Fireman v. Chicago, R.I. & P.R. Co.,* 393 U.S. 129, 143 (1968) ("full crews" on railroads).

However, there is confusion among the lower federal courts as to the reach of *Ferguson,* and particularly whether the principle of judicial nonintervention applies when statutes are alleged to violate the Right of Privacy or other individual rights and liberties. In cases involving hairlength regulations, a number of courts have applied *Ferguson,* improperly we believe, in sustaining the regulations. The Tenth Circuit, in *Freeman v. Flake,* 448 F.2d 258 (10th Cir. 1971), sustained a school hairlength regulation using language substantially indentical to that used by the District Court below:

> We doubt the applicability of the test of reasonableness in the determination of the nebulous constitutional rights here asserted. The issue should not turn on views of a federal judge relating to

> the wisdom or necessity of a school regulation controlling the length of hair worn by a male student in a state public school. In Ferguson v. Skrupa, 372 U.S. 726, 730, 83 S. Ct. 1028, 1031, 10 L. Ed.2d 93, the Court said that the courts will not "substitute their social and economic beliefs for the judgment of legislative bodies." The same principle is pertinent to dress codes of school boards. We do not read Griswold v. Connecticut as over-ruling Ferguson v. Skrupa. The Griswold decision turned on the specific issues there presented. 448 F.2d at 261.

See also, *Karr v. Schmidt,* 460 F.2d 609, 614-15 (5th Cir. 1972); *Ashley v. City of Macon, Ga.,* 377 F. Supp. 540, 543 (D.C. Ga. 1974); *Farmer v. Catmull,* 339 F. Supp. 70, 72-73 (D.C. Utah 1972).

In other cases involving hairlength regulations, the Courts have inquired into the interests supporting these regulations, and have declared them unconstitutional when not supported by legitimate state interests. See, *e.g., Bishop v. Colaw,* 450 F.2d 1069 (8th Cir. 1971); *Richards v. Thurston,* 424 F.2d 1281 (1st Cir. 1970); *Breen v. Kahl,* 419 F.2d 1034 (7th Cir. 1969); *Barry v. Dwen,* __F.2d__(2d Cir. 1975), *cert. granted,* 43 U.S.L.W. 3621 (May 27, 1975) (No. 74-1269).

Barry v. Dwen involves a regulation issued by the Suffolk County Police Department specifying the acceptable length of hair, mustaches, etc., for individual police officers. Petitioners believe it is significant that the Commissioner of the Suffolk County Police Department, in his Petition for a Writ of Certiorari filed in this Court, does not argue the extreme position of total judicial nonintervention based upon *Ferguson.* Instead, it is argued that the regulation is justified by

a number of legitimate state interests, including the safety of the officer and the "morale factor." See Pet. at pp. 2, 6-7. Whatever the merit of these asserted state interests, this is a fundamentally different position from that adopted in *Freeman v. Flake, supra,* and by the Court below, which was that the Courts could not even inquire into the state interests supporting the challenged statute or regulation.

A distinction must be carefully drawn between legislation involving commercial and economic matters and legislation which infringes upon personal rights and liberties. In *Levy v. Louisiana,* 391 U.S. 68 (1968), the Court discussed *Ferguson* and related cases in the context of a constitutional challenge based upon the Equal Protection Clause, and made the following distinction which we believe is also appropriate in connection with the privacy claims involved in the case, 391 U.S. at 71:

> In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications. . . . However that might be, was have been extremely sensitive when it comes to basic civil rights (*Skinner v. Oklahoma, supra,* at 541; *Harper v. Virginia Board of Elections,* 383 U.S. 663, 669-670) and have not hestitated to strike down an invidious classification even though it had history and tradition on its side. (*Brown v. Board of Education,* 347 U.S. 483; *Harper v. Virginia Board of Elections, supra,* at 669).

As Justice Levinson of the Supreme Court of Hawaii recently stated, *State v. Kantner,* 53 Haw. 327, 493 P.2d 306, 317-18, *cert. denied,* 409 U.S. 948 (1972):

> Any criticism which attempts to deter courts from inquiring into the constitutionality of laws must

> distinguish between legislation which seeks to regulate economic and social relationshhips and that which intrudes into the purely private sphere of human life. In the former instance courts rightfully grant the legislature wide latitude for experimentation in the promotion of the general good. But, where the State endeavors to intrude into the individual's private life and regulate conduct having no public significance, it is the duty of the courts to offer a haven of refuge where the individual may secure vindication of his right to be let alone.

See also, Hamilton, Federalist Paper No. 78, *The Federalist Papers* at p. 469 (Rossiter Ed. 1961):

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the acts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July, 1975.

APPENDIX

APPENDIX A – Judgment of the Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-2528

LOUISIANA AFFILIATE OF THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS, *et al.*,

Plaintiffs-Appellants,

v.

HON. WILLIAM J. GUSTE, JR., Attorney General of the State of Louisiana, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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(April 17, 1975)

Before GIBSON*, THORNBERRY and AINSWORTH, Circuit Judges.

PER CURIAM:

AFFIRMED, on the basis of the well-reasoned opinion of District Judge Comiskey, 380 F. Supp. 404 (1974).

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* Of the Eighth Circuit, sitting by designation.

APPENDIX B – Memorandum of the District Court Denying The Application for a Three-Judge Court

UNITED STATES DISTRICT COURT
Eastern District of Louisiana

Civil Action No. 74-163

The Louisiana Affiliate of the National Organization For the Reform of Marijuana Laws (NORML), *et al.*,

Plaintiffs,

v.

Hon. William J. Guste, Jr., Attorney General of the State of Louisiana, *et al.*,

Defendants.

March 19, 1974

COMISKEY, District Judge

MEMORANDUM OF REASONS

The plaintiffs herein have filed suit seeking declaratory and injunctive relief against the Federal Controlled Substances Act and the Louisiana Controlled Dangerous Substance Law insofar as they make the private use and possession of marijuana by adults a crime in Louisiana. The federal statutes which prohibit the possession of marijuana are contained in 21 U.S.C. § 801-904. The Louisiana provision is encompassed in LSA-R.S. 40:966.

Plaintiffs allege that these statutes violate their rights of privacy and personal liberty guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments and by the Ninth Amendment as well as constituting cruel and unusual punishment under the Eighth Amendment. They contend that these laws encroach on constitutionally protected zones of privacy since social, medical and historical facts show that there can be neither an overwhelming compelling state interest nor any possible relationship to a legitimate state interest which can justify the exercise of the police powers of the state. In addition they allege that the criminalization of the mere possession of marijuana is a violation of the equal protection clause of the Fifth and Fourteenth Amendments which constitutes invidious and arbitrary discrimination since other more potentially harmful substances such as alcohol and cigarettes are not subject to the same control.

The anonymous representative John Doe seeks to maintain a class action. Doe's identity is to be revealed to the Court in a sealed affidavit.

Presently before the Court for consideration is the propriety of the plaintiff's request for convening a three-judge court pursuant to 28 U.S.C. 2284.

The scope of a district court's considerations when a three-judge court has been requested is set out in *Idlewild Bon Voyage Liquors Corp. v. Epstein*, 370 U.S. 713, 82 S. Ct. 1294, 1296, 8 L.Ed. 794 (1962):

> "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise

comes within the requirements of the three-judge statute."

The present question at issue is the substantiality of the question presented. Several general principals emerge from the cases.

> "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint."

Mosher v. Phoenix, 287 U.S. 29, 53 S. Ct. 67, 7 L.Ed. 148, 1922; *Levering-Garriques & Co. v. Morrin*, 289 U.S. 103, 53 S. Ct. 549, 77 L.Ed. 1062 (1933); *Local U. No. 300 Amal. Meat Cutters & B. Work v. McCulloch*, 428 F. 2d 396 (5th Cir. 1970). The Supreme Court in *Ex Parte Poresky*, 290 U.S. 30, 54 S. Ct. 3, 4, 78 L.Ed.2d 152 (1933) set forth the dual standards under which substantiality must be determined.

> "The question may be plainly insubstantial, either because it is "obviously without merit" or because "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."

These two criteria have been somewhat refined by the appellate courts,

> "Insubstantiality in the claim may appear because of absence of federal jurisdiction, lack of substantive merit in the constitutional claim, or because injunctive relief is otherwise unavailable. Such insubstantiality may be evident from the frivolous nature of the claim or from previous decisions of

> the Supreme Court which require an adverse answer. *Maryland Citizens for a Rep. Gen. A. v. Governor of Md.*, 529 F.2d 606 (4th Cir. 1970)

In the present case the issues of jurisdiction against the federal and state defendants as well as the question of preclusion of substantiality through prior decisions is not present. The state defendants come within the provisions of 42 U.S.C. 1983 since state action is attacked which allegedly results in the deprivation of constitutional rights. The federal defendants are covered by the issue of a federal question as alleged in the complaint under 28 U.S.C. § 1331. Although attacks on the constitutionality of these statutes have been made in criminal proceedings, research reveals no civil action for declaratory or injunctive relief in which a decision has been rendered.

The Eighth Circuit in *The Herald Company v. Harper*, 410 F.2d 125 (8th Cir. 1969) commented on the problem of substantiality which we ourselves face in resolving this issue:

> "At the outset we realize, as Judge Friendly has stated, "these tests cannot be of mathematical precision. Previous decisions do not always foreclose new considerations even though they are directly on point, as the single district judges correctly thought in convoking three-judge courts in the second flag salute case . . . and in the desegregation cases. The other basis for finding lack of substantiality, obvious lack of merit, is still less precise; judges have not been fitted with identical lenses for detecting just when lack of merit is obviously such." *Id.* p. 128.

Plaintiff's causes of actions may be categorized into three general categories: 1) violation of right of privacy; 2) cruel and unusual punishment and 3) violation of equal protection of the laws.

The plaintiffs' allegation regarding privacy springs from *Roe v. Wade*, ___U.S.___, 93 S. Ct. 705 (1973) and *Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L.Ed.2d 542 (1969). Plaintiff alleges that the concept of the constitutional right of privacy has now evolved to the point that its mere invocation raises a constitutional issue. In the recent case of *Roe v. Wade, supra*, the court said,

> "The Constitution does not explicitly mention any right of privacy. In a line of decisions . . . the Court has recognized that a right of personal privacy, or a guarantee of certain zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed "fundamental" or implicit in the concept of ordered liberty are included in this guarantee of personal liberty." *Id.*, p. 726.
>
> "The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a state may properly assert important interests in safeguarding health, in maintaining medical standards and in protecting potential life."

Plaintiff in the present case bases his claim to privacy on a far too expansive interpretation of this phrase. The present case does not rest its roots in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 89 S. Ct. 1243, 22 L.Ed.2d 542 (1969), in the Fourth and Fifth Amendment, *Terry v. Ohio*,

392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968); *Katz v. U.S.*, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967), in penumbras of the Bill of Rights, *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 14 L.Ed.2d 510 (1965) or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. All of the above cases have involved concepts of basic and fundamental rights such as the right to marry, to bear children, to think and read what one wishes, to worship God according to the dictates of his conscience, to acquire useful knowledge. Even *Roe* and *Doe* came within these basic provisions and to a large extent are no more than a logical extension of the *Griswold* philosophy of marital privacy as applied to women. Plaintiffs' claim in the present case rests on bare allegations of a general right to privacy to do what one wishes in his own home and with his own body. Although plaintiff does claim enforcement of this right of privacy through the Fifth and Fourteenth Amendment and through the Ninth Amendment he does not ground it or even attempt to ground it on any one of the amendments which protect certain guaranteed rights and which in doing so create constitutionally guarded zones of privacy. The right of plaintiff to possess marijuana in his own home can under no factual or legal interpretation be classified as fundamental or implicit in the concept of ordered liberty.

The Supreme Court in *Stanley v. Georgia*, the very case relied on so strongly by plaintiff, qualified its approval of private possession of obscene material with the following:

> "What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the

> Georgia statute's infringement of fundamental liberty protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal. *Stanley*, footnote 11 at 394 U.S., at 568, 89 S. Ct. at 1249, 22 L.Ed.2d 551.

The Fifth Circuit in *U.S. Drotar*, 416 F.2d 914 (5th Cir. 1969) used this very expression of the Supreme Court in *Stanley*, to uphold an attack on the constitutionality of a guilty plea under the now repealed provision of 26 U.S.C. § 4741(a) in violation of 26 U.S.C. 4744(a)(1) for possession of marijuana without payment of the tax imposed by law. The court's reasoning in *Drotar* reflects the part "fundamental liberties" plays in defining the concept of privacy.

However, even conceding that plaintiff's right to possess is fundamental even *Roe* & *Doe* recognized that they may be curtailed by "compelling state interest", *Roe v. Wade*, ___ U.S. ___, 93 S. Ct. 705, 728 (1973). 21 U.S.C. § 801 and LSA-R.S. 40:962 expresses the state interest behind the federal and state prohibitions.

> "The Congress makes the following declarations:
>
> (1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.
>
> (2) The illegal importation, manufacture, distribution and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801 (1) & (2).

The legislative intent of the state in controlling dangerous drugs is found in the criteria set out in LSA-R.S. 40:962(A) (1-8) and in LSA-R.S. 40:963(A). The fact that they are addressed to the State Board of Health reflects the considerations which moved the Louisiana legislature to control dangerous drugs:

> "In making such a determination the State Board of Health shall consider the following:
>
> (1) Its actual or relative potential for abuse;
> (2) Scientific evidence of its pharmacological effect, if known;
> (3) State of current scientific knowledge regarding the substance;
> (4) Its history and current pattern of abuse;
> (5) The scope, duration and significance of abuse;
> (6) What, if any, risk there is to public health;
> (7) Its psychic or physiological dependence liability; and
> (8) Whether the substance is an immediate precursor of a substance already controlled by this section.
>
> "In determining that a substance is to be added to these schedules, the State Board of Health shall find the following:
>
> A. As to Schedule I:
>
> (1) The drug or other substance has a high potential for abuse;
> (2) The drug or other substance has no currently accepted medical use in treatment in the United States;
> (3) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

Plaintiff alleges that this reasoning is incorrect by virtue of recent scientific findings and investigations and urges this court to upset this specific finding of the legislature. In order for the court to do this it would be necessary for this court to substitute its judgment based on social, economic, historical and scientific evidence for that of the respective legislatures. The Supreme Court has specifically turned away from such an approach in *Ferguson v. Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L.Ed.2d 93 (1963). Congress and the state legislature have both found it necessary for general health and welfare to regulate the use and possession of dangerous drugs. This court is in no position to substitute its judgment for that of the legislature.

Plaintiffs also contend that the criminal sanctions imposed for the possession and use of marijuana constitute cruel and unusual punishment under the Eighth Amendment. Plaintiff's allegation under this cause of action has validity only if the conduct proscribed is disproportionate to the offense, *Kasper v. Brittian*, 245 F.2d 92, cert. den. (6th Cir. 1957), 355 U.S. 834, 78 S. Ct. 542 L.Ed.2d 46 (1957), reh. den., 355 U.S. 886, 78 S. Ct. 147, 2 L.Ed. 115 (1957). The punishment becomes disportionate only if the conduct should not be proscribed or only if the punishment is clearly arbitrary and without rational relationship to the crime. Since the court finds that the conduct is legitimately proscribed by the legislatures and that it encompasses no fundamental right the Eighth Amendment argument has no validity.

Plaintiff rests finally on the prohibitions of equal protection. Plaintiff alleges that invidious discrimination is present since no rational basis exists for treating marijuana different from cigarettes or alcohol. Classification becomes unreasonable only when they are arbitrary and rest upon no rational basis, *Lindsley v. National Carbonic Gas Company*, 220 U.S.

61, 31 S. Ct. 337, 55 L.Ed. 369 (1911); *Morey v. Doud*, 354 U.S. 457, 77 S. Ct. 1344, 1 L.Ed.2d 1484 (1957). The legislatures, both federal and state, rest their distinction in treatment on their obligation and authority to legislate for the public health and welfare. It is only by substituting a judicial judgment that this is incorrect that these statutes can be overturned, see *Ferguson, supra.*

The Fifth Circuit's admonition in *Jackson v. Choate*, 404 F.2d 910 (5th Cir. 1968):

> "Except for cases on which there can be no doubt at all, the alternatives to certification and constituting of a three-judge court as unsatisfactory and administratively disadvantageous with no compensating redeeming virtue of a substantive kind."
> *Id.*, p. 912.
>
> "In this day and time of dynamic expansion of constitutional principles and their application to new and sometimes unheard of situations it takes judicial prescience of a delphic order to say with certainty that the attack is insubstantial. It is the better course – certainly from an administrative standpoint – to forego the doubts, constitute a three-judge court, and allow that court to determine initially this and other issues."
> *Id.*, p. 913.

is not applicable under the circumstances of the present case.

The plaintiff's request for the covening of a three-judge court is hereby and the same denied for lack of a substantial federal question since the allegations are plainly without merit. The right to possess and use marijuana in one's own

home is not and cannot be classified as a fundamental right protected by a constitutional zone of privacy.

/s/ Judge Comiskey
UNITED STATES DISTRICT JUDGE

March 19, 1974

APPENDIX C – Judgment and Minute Entry of the District Court Dismissing the Complaint

UNITED STATES DISTRICT COURT
Eastern District of Louisiana

Civil Action No. 74-163

[Title omitted in printing]

May 31, 1974

JUDGMENT

The Court having on May 29, 1974, for the reasons dictated into the record and the memo of reasons filed herein on the 19th day of March, 1974, granted the motions of defendants, Hon. William J. Guste, Jr., Hon. Edwin Edwards, William B. Saxbe and Hon. John R. Bartels, to dismiss:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Hon. William J. Guste, Jr., Attorney General of the State of Louisiana; Hon. Edwin Edwards, Governor of the State of Louisiana; William

B. Saxbe, Attorney General of the United States and Hon. John R. Bartels, as Administrator of the Drug Enforcement Administration of the Federal Government, and against plaintiffs, The Louisiana Affiliate of the National Organization for the Reform of Marijuana Laws (NORML) and John Doe, on behalf of himself and all others similarly situated, dismissing said plaintiffs' suit at their costs.

New Orleans, Louisiana, this 31st day of May, 1974.

BENJAMIN W. REISCH, Clerk
By: /s/ Nelson B. Jones
Chief Deputy Clerk

APPROVED AS TO FORM:

/s/ Judge Comiskey
UNITED STATES DISTRICT JUDGE

* * *

[Title omitted in printing]

Minute Entry

July 1, 1974

On May 29, 1974, there came on for hearing motions to dismiss by each of the three defendants. At that time the Court ruled from the bench granting the motions and orally adopted its previous Memorandum of Reasons denying the plaintiffs' request to convene a three-judge court. The Court now formally adopts as its reasons for judgment granting

defendants' motions to dismiss its March 19, 1974 Memorandum of Reasons denying plaintiffs' request for a three-judge court. In consideration of these reasons, a copy of which is attached, the defendants' motions are hereby granted and the case dismissed.

/s/ Judge Comisky
UNITED STATES DISTRICT JUDGE

APPENDIX D – Statutory Provisions Involved

(1) The Federal Controlled Substances Act, 21 U.S.C. Sec. 801, *et seq.*

Sec. 404(a), 21 U.S.C. Sec. 844(a). Penalty For Simple Possession.

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. Any person who violates this subsection shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both, except that if he commits such offense after a prior conviction or convictions under this subsection have become final, he shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

Sec. 202, 21 U.S.C. Sec. 812. Schedules of Controlled Substances.

(c) Schedules I, II, III, IV, and V shall, unless and until amended pursuant to section 811 of this title, consist of the

following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

Schedule I
* * *

(c) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

* * *

(10) Marihuana
* * *

(2) The Louisiana Controlled Dangerous Substances Law, LSA-R.S. 40:961, *et seq.*

Sec. 966, LSA-R.S. 40:966. Prohibited acts – Schedule I; penalties.

C. **Possession.** It is unlawful for any person knowingly or intentionally to possess a controlled dangerous substance classified in Schedule I unless such substance was obtained directly, or pursuant to a valid prescription or order from a practitioner or as provided in R.S. 40:978, while acting in the course of his professional practice, or except as otherwise authorized by this part. Any person who violates this subsection with respect to:

(1) A substance classified in Schedule I which is a narcotic drug (all substances in Schedule I preceded by an asterisk "*"), shall be imprisoned at hard labor for not less than four years nor more than ten years without benefit of probation

or suspension of sentence and may, in addition, be required to pay a fine of not more than five thousand dollars.

(2) Any other controlled dangerous substance classified in Schedule I, shall be imprisoned at hard labor for not more than ten years, and may in addition, be required to pay a fine of not more than five thousand dollars.

D. **Possession of marijuana.** (1) On a first conviction for violation of Subsection C of this section with regard to marijuana, the offended shall be fined not more than five hundred dollars and/or imprisoned in the parish jail for not more than six months.

(2) On a second conviction for violation of Subsection C of this section with regard to marijuana, the offender shall be fined not more than two thousand dollars and/or imprisoned with or without hard labor for not more than five years.

(3) On a third or subsequent conviction for violation of Subsection C of this section with regard to marijuana the offender shall be sentenced to imprisonment with or without hard labor for not more than twenty years.

Sec. 964, LSA-R.S. 40:964. Composition of schedules.

Schedules I, II, III, IV and V shall, unless and until added to pursuant to R.S. 40:962, consist of the following drugs or other substances, by whatever official name, common or unusual name, chemical name, or brand name designated:

SCHEDULE I

* * *

C. **Hallucinogens.** Unless specifically excepted or unless listed in another Schedule, any material, compound, mixture, or preparation, which contains any quantity of the following

hallucinogenic substances, or which contains any of their salts, isomers and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

* * *

(10) Marijuana

* * *

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM 1975

No. 75-91

LOUISIANA AFFILIATE OF THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS (NORML), ET AL
Petitioners

VS.

HONORABLE WILLIAM J. GUSTE, JR., ET AL
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

STATEMENT OF THE CASE 1

ISSUE 2

ARGUMENT 2

CONCLUSION 8

CERTIFICATE 9

INDEX OF AUTHORITIES

I. **Statutes:**

LSA-R.S. 40:961 et seq. ..... *passim*

21 U.S.C. 3801 et seq. ..... *passim*

II. **Cases:**

Ferguson v. Skrupa, 372 U.S. 726 (1963) 5

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 5

Roe v. Wade, 410 U.S. 113 (1973) 3

Stanley v. Georgia, 394 U.S. 557 (1969) 2

Rener v. Beto, 447 F. 2d 20 (5th Cir. 1971) 5

Rogers v. U.S., 304 F. 2d 520 (5th Cir. 1962) 7

U.S. v. Drotar, 416 F. 2d 914 (5th Cir. 1969) 7

Osborne v. Ozlin, 29 F. Supp. 71, affirmed 310 U.S. 53 3

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STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

Petitioners herein filed a complaint in the U.S. District Court for the Eastern District of Louisiana on January 21, 1974. The complaint sought the convening of a three-judge court pursuant to 28 U.S.C. § 2281, et. seq., and declaratory and injunctive relief against the constitutionality and enforcement of LSA-R.S. 40:961, et. seq. and 21 U.S.C. § 801, et seq. These statutes make criminal the private use and possession of marijuana by adults. The District Court, Comiskey, J., held that plaintiff's complaint stated no substantial constitutional question and denied the request for a

three-judge court. From this dismissal, plaintiffs appealed. The Fifth Circuit affirmed per curiam, expressly approving what it termed the "well-reasoned" opinion rendered by District Judge Comiskey, 380 F. Supp. 404. From this background arises plaintiff's petition for a Writ of Certiorari.

ISSUE

It is respectfully submitted that the only issue of any moment herein is whether the plaintiff's complaint stated a constitutional question of sufficient substantiality to necessitate the convening of a three-judge court.

ARGUMENT

I.

Petitioners contend that the right to possess marijuana in the home emanates from the First Amendment right to privacy, and by close association therewith somehow achieves the status of a fundamental right which they argue is guaranteed by the Constitution. Additionally, petitioners argue that the State and Federal statutes regulating possession of marijuana are not founded upon a compelling state interest which is necessary to empower the State to infringe upon this so-called fundamental right. In support of this contention, petitioners cite *Stanley v. Georgia*, 394 U.S. 557 (1969), which included possession of obscene materials in the home among those activities protected by the right to privacy. The District Court, however, refuted petitioner's interpretation of *Stanley* by quoting the

following *caveat* contained in the *Stanley* opinion: "What we have said, in no way infringes upon the power of the State or Federal Government to make possession of other items such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberty protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal." *Stanley*, footnote 11 at 394 U.S. at 568. In *Roe v. Wade*, 410 U.S. 113 (1973), this Court pointed out that "only personal rights that can be deemed 'fundamental' in the concept of ordered liberty are included in this guarantee of personal privacy." *Roe* at 410 U.S. at 152. This class encompasses such rights as marriage procreation, contraception, the right to receive ideas, and others. *Roe*, 410 U.S. at 152, and cases cited therein. Clearly, the right to possess marijuana is not, at this point in time, subsumed under these rights. In the light of these decisions, to so include said right would defy logic. The District Court refused to classify the possession of marijuana as a fundamental right. When fundamental rights are not abridged, a statute must be clearly shown to have no rational basis in order for a finding of unconstitutionality to result. Every possible reasonable basis which might support the statute must be negated by the party attacking the statute. *Osborne v. Ozlin*, 29 F. Supp. 71, affirmed 310 U.S. 53. In the instant case, it is readily apparent from the current state of scientific evidence pertaining to marijuana

that a rational basis for legislative prohibition of the drug does indeed exist. See, e.g., "Hearings on the Marijuana-Hashish Epidemic and its Impact on United States Security" conducted by the Committee on the Judiciary of the United States Senate, May, 1974. It is conceded that much evidence has been adduced which indicates that marijuana used under certain conditions, is not harmful. On the other hand, the above cited hearings disclosed an equal, *if not greater*, amount of equally valid scientific evidence condemning the use of marijuana. The net result is such that the legislature must draw conclusions on the basis of what it deems wise, considering all available evidence. Petitioner is, in effect, asking the Court to draw an opposite conclusion from the same set of facts which prompted the legislature to proscribe possession of marijuana. In *U.S. v. Drotar*, 416 F. 2d 194 (5th Cir. 1969), a similar question was presented: "The appellant has cited us to an extensive list of scientific authorities supporting his contention that marijuana is neither addictive nor harmful; the government has cited us to an extensive list of authorities to the contrary. This, it seems, is a fair indication of scientific opinion on the matter at the present time". It is well established that when such a situation exists, the decision of the legislature is not to be judicially overruled if a reasonable basis exists for the statute. When faced with a similar dichotomy of opinion involving obscene matter and its effects on society, this Honorable Court said: "We do not demand of legislatures 'scientifically certain criteria of legislation'. Although there is no

conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such connection does or might exist . . . . From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs". *Paris Adult Theatre I v. Slaton*, 413 U.S. at 61 (1973). In *Rener v. Beto*, 447 F. 2d 20 (5th Cir. 1971), the defendant attacked the Texas marijuana law, claiming no rational basis therefor existed. The Court, in upholding the conviction and statute under which it was obtained, said: "Our standard for reviewing the statutory scheme used in Texas for controlling drugs is not whether it is wise or desirable. Legislatures have been given wide powers of discretion when it comes to classifications in the adoption of police laws and it is limited only when such classification is without *any reasonable basis* . . . . We are unable to say that the Texas legislature acted arbitrarily or without a reasonable basis when it classified marijuana, together with addictive drugs, as a narcotic". *Rener*, 447 F. 2d at 22, 23. The general principle that the judiciary shall not substitute its judgment for that of the legislature where a rational basis exists is given voice by this Court in *Ferguson v. Skrupa*, 372 U.S. 726 (1963): "Under the system of government created by our Constitution, it is up to the legislatures, not courts, to decide on the wisdom and utility of legislation . . . . We have returned to the original constitutional proposition that courts do not

substitute their economic beliefs for the judgment of legislative bodies, who are elected to pass laws" (372 U.S. at 729, 730).

For the foregoing reasons, the State of Louisiana respectfully submits that due to the current state of scientific knowledge regarding marijuana, it is not possible for petitioners to show clearly that no reasonable basis exists for the posture of LSA-R.S. 40:961 et. seq. and 21 U.S.C. § 801 et seq. Accordingly, the wisdom and utility of these statutes are not properly drawn in question by the courts; as a result, no substantial constitutional question is presented, and the issue is not properly justiciable before a three-judge court. The District Court was correct in its denial of plaintiff's motion to convene such three-judge court.

II.

Petitioners contend that the penalties contained in LSA-R.S. 40:961 et. seq. and 21 U.S.C. § 801 et. seq. violate the Eighth Amendment's prohibition of cruel and unusual punishment. Louisiana's law for the unlawful possession of marijuana provides for a fine of not more than $500.00 and/or imprisonment in the parish jail for not more than six months on a first conviction; on a second conviction, the offender shall be fined not more than $2,000.00 and/or imprisoned with or without hard labor for not more than five years; and, on a third or subsequent conviction, the offender shall be sentenced to imprisonment with or without hard labor for not more than twenty years. Additionally, LSA-R.S. 40:983 provides for

the conditional discharge of the offender for possession of marijuana as a first offense. In such an instance, the court may, without entering a judgement of guilt and with the consent of such person, defer proceedings and place him on probation upon such reasonable terms and conditions as may be required. Upon fulfillment of said terms and conditions of probation, the court shall discharge such person and dismiss the proceedings against him. Such disposition is without court adjudication of guilt and is not a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed on second or subsequent convictions under Louisiana's Second or Subsequent Offenses Statute.

By way of rebuttal to petitioners' Eighth Amendment claims, the Fifth Circuit upheld a sentence of *thirty years*' imprisonment upon conviction of possession of marijuana: "This Circuit has long followed the principle that a sentence within the statutory limits set by a legislature is not to be considered cruel or unusual". *Rener v. Beto*, 447 F. 2d 20, 23. In *U.S. v. Drotar*, 416 F. 2d 914, the same Court upheld a five year sentence for possession of marijuana, which included *denial of probation or parole*: "Punishment is not 'cruel and unusual' unless it is so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice". (Quoting *Rogers v. U.S.*, 304 F. 2d 520) Considering these decisions, to label Louisiana's system "cruel and unusual" would be untenable, arbitrary and illogical.

CONCLUSION

Much has been said in favor of legalizing or decriminalizing marijuana. An equal amount of condemnation of the drug has arisen from other well-qualified scientific circles. Respondents herein do not pretend to have the answer and this is precisely the issue: Unless, and until, concrete conclusions and facts are available regarding the effects of marijuana upon the individual and society, it is not within the Court's province to reverse the judgement of the legislature on constitutional grounds—society is simply not possessed of enough knowledge to bestow upon its members the right to use this drug, whose effects we are unsure of. Therefore, the State's respondents respectfully request that this Honorable Court find that no substantial constitutional question is presented herein, and that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Brief has been served on the following:

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Baton Rouge, Louisiana, this_____day of August, 1975.

_____

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